



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

PETITION NO 12 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JAMES OMARIBA NYAOGA.....1ST PETITIONER

JOSEPH MARANGA AMENYA.....2ND PETITIONER

VRS

THE SPEAKER OF THE COUNTY ASSEMBLY KISII COUNTY.....1ST RESPONDENT

THE KISII ASSEMBLY SERVICE BOARD KISII COUNTY.....2ND RESPONDENT

THE KISII COUNTY ASSEMBLY.....3RD RESPONDENT

RULING

The petitioners James Omariba Nyaoga and Joseph Maranga Amenya are the Clerk and Finance Director respectively, of County Assembly of Kisii. They filed the instant petition against the Respondents, The Speaker of the County Assembly Kisii County (1st Respondent) the Kisii Assembly Service Board (2nd Respondent), and the Kisii County Assembly (3rd Respondent) alleging violation and infringement of their fundamental rights. Simultaneously with the Petition, they filed a Motion under certificate of urgency seeking the following Conservatory Orders.

1. The application herein be certified urgent and the same be heard Ex-parte in the first instance.
2. Pending the hearing and determination of the instant application, the Honourable court be pleased to grant an Interim order of Injunction, restraining the Respondents either by themselves, agents, servants and/or employees, from commencing disciplinary action, disciplining, suspending, preventing, barring, restricting and or interfering with the and Director Finance, Kisii County Assembly, respectively, whatsoever and/ or howsoever subject only to observance of the provisions of the County Government Act No. 17 2012 and the Public Finance Management Act, 2012
3. Pending the hearing and determination of the instant application, the Honourable court be pleased to grant an Interim Order of Injunction restraining the Respondents either by themselves, agents, servants and/or employees, from appointing and/or constituting any other person(s) to act as the clerk and Director of Finance, Kisii County Assembly, in place of the Petitioners/Applicants, respectively, without regard to the due process of the law.
4. Pending the hearing and determination of the instant application, the Honourable court be pleased to

grant an Interim Conservatory Order, to protect, preserve and/or conserve the status of the Petitioners/Applicants as the clerk and Director Finance, Kisii County Assembly respectively and in particular, barring the Respondents jointly and/or severally from commencing and/or undertaking any disciplinary action against the petitioners/applicants, based on the report and recommendations of the justice and legal affairs committee of the 3rd Respondent and which were adopted by the 3rd Respondent.

5. The Honourable court be pleased to grant an Order of Temporary Injunction, prohibiting and/or restraining the Respondents either by themselves, agents, servants and/or employees, from commencing disciplinary action, disciplining, suspending, preventing, barring, restricting and/or interfering with the Petitioners'/Applicants' performance, discharge and/or Execution of their duties as the clerk and Director Finance, Kisii \county Assembly, respectively, whatsoever and/or whosoever, subject only to observance of the provisions of the County Government Act, No. 17 2012 and the Public Finance Management Act 2012, pending the hearing and determination of this Petition.

6. The Honourable court be pleased to grant an order of Temporary Injunction, prohibiting and/or restraining the Respondents either by themselves, agents, servants and/or employees, from appointing and/or constituting any other person(s) to act as the clerk and Director of Finance, Kisii County Assembly, in place of the Petitioners/Applicants, respectively, without regard to the due process of the Law, pending the hearing and determination of this Petition.

7. The Honourable court be pleased to grant Conservatory Order, to protect, preserve and/or conserve the status of the Petitioners/Applicants as the clerk and Director Finance, Kisii County Assembly, respectively and n particular, barring the Respondents jointly and/or severally from commencing and/or undertaking any disciplinary action against the Petitioners/Applicants, based on the Report and recommendations of the Justice and Legal affairs Committee of the 3rd Respondent and whi8ch were adopted by the 3rd Respondent, pending the hearing and determination of this Petition.

8. The Conservatory Orders, if any, granted by this Honourable court to be implemented and/or enforced by the O.C.P.D, Kisii Central Police Division and/or such other officer as the Honourable court may Decree.

9. Costs of this application be borne by the Respondents jointly and/or severally.

The motion was heard ex-parte on and an interim order of injunction was granted to the Petitioners/Applicants restraining the Respondents either by themselves, their agents, servants and/or employees from commencing disciplinary action, disciplining, suspending, preventing, barring, restricting and/or interfering with the Petitioners'/Applicants' performance, discharge and/ or execution of their duties as the Clerk and Director Finance, Kisii County Assembly, respectively, whatsoever and/or howsoever, subject only to the observance of the provisions of the County Government Act No. 17/2012 and the Public Finance Management Act, 2012. The application was fixed for hearing inter-parties on 21st May, 2015.

When the application came before me for directions I directed the parties to file skeleton submissions which were subsequently highlighted by Mr. Mboya Oguttu, Counsel for the Petitioners/Applicants and Mr. Nyambati, counsel for the Respondents. The Petitioners counsel also filed a list of authorities.

Background

The Petition herein arises from letters written to the Petitioners on 8th May, 2015 requiring them to appear before the Kisii County Assembly Board on 11th May, 2015 to respond to charges of abuse of office. The letters read as follows;

KISII COUNTY GOVERNMENT

COUNTY ASSEMBLY

8th May, 2015

Mr. James Omariba Nyaoga/ Mr. Joseph Ameyia

county Assembly Clerk/Director , Finance

Kisii County Assembly

KISII

RE: ABUSE OFFICE

The above subject matter refers.

In pursuit to this office County Assembly Report of Justice and Legal Affairs, you are accused of abuse of office as follows:-

i) That you entered into a fraudulent contract with APA Insurance for medical cover for the County Assembly members leading to a loss of Kshs. 9.5 million.

ii) That in doing this, there was failure on your part to seek authority from the County Assembly Service Board for approval of expenditure.

These kinds of commissions and/or omissions are uncalled for and unwarranted . Paradoxically, you have no excuse.

In view of the aforesaid, you are hereby invited to appear before the Board on Monday 11th May, 2015 at 10.a.m in the County Assembly Boardroom in order to present your case.

You are equally required to carry copies of the relevant tender committee report.

signed

Hon. Kerosi Ondieki

Chairman, Kisii County Assembly Service Board

The Petitioners allege that the notice to show cause is unlawful and illegitimate, that the medical insurance contract awarded to APA Insurance Company Limited was lawful and valid, that the intended disciplinary proceedings are pre-concluded and premeditated and would not be impartial. They argued that the Petitioners have a *prima facie* case warranting the grant of the orders sought.

The Respondent filed a replying affidavit opposing the application and in the written submissions aver that the 3rd Respondent has a mandate to exercise oversight role in the management of public funds while the 2nd Respondent is the legitimate authority for purposes of disciplining the Petitioners. The Respondent avers that the 1st Respondent wrote the disciplinary letters in his capacity as chairman of the 2nd Respondent, the County Assembly Service Board and not as Speaker of the County Assembly, who is the 2nd Respondent.

Determination

Having carefully considered the motion and the submissions by the parties it is my considered opinion that the only issue for determination at this stage is whether the Petitioners/Applicant's have sufficiently established the existence of a violation or threat of violation to justify the intervention of this court by the granting of the orders sought.

The Petitioners allege that being employees of the 2nd Respondent issues touching on their discipline can only be addressed by the 2nd Respondent, and that the 2nd Respondent, being a body corporate, can only act through a duly convened meeting.

The Applicants further submit that minutes of such meetings can only be dispatched by the clerk who in this case happens to be the 1st Petitioner.

The Petitioners state that it is the chair of the 2nd Respondent who, on his own motion without the consent of the 2nd Respondent issued the notices to show cause to the Petitioners. The Petitioners aver that the notice is issued by the 1st Respondent without jurisdiction and amounts to usurpation of powers of the 2nd Respondent an act prohibited by Article 2(2) of the Constitution.

The Petitioners further aver that the notices were issued on 8th May, 2015 at 5pm and they were required to respond to the allegations and appear before the disciplinary team of the 2nd Respondent on Monday 11th May, 2015 thus not giving them adequate notice of 21 days as provided in the Public Service Regulations which apply *mutatis mutandis* to employees of County Service Board, that the Petitioners were thus given only one day's notice as Sunday is excluded by virtue of Article 259(1). The Petitioners thus aver that the notice to show cause was invalid and void.

The Petitioners further allege discrimination on grounds that they were the only ones targeted for disciplinary action over allegations of fraud involving the tendering process while all other members of the tendering committee were not called upon to respond to similar allegations. In this respect the Petitioners rely on the Court of Appeal decision in Joram Mwenda Guantai v Chief Magistrate, Nairobi

It was submitted for the Petitioners that the intended disciplinary action was the subject of an inquiry by a select committee of the 3rd Respondent which in its report recommended disciplinary action against the Petitioners with a view to having them dismissed. The Report was adopted by the 3rd Respondent to be executed by the 2nd Respondent. The Petitioners aver that the 2nd Respondent was not given a window to exercise discretion as the report directed it to dismiss the Petitioners.

It was further submitted for the Petitioners that out of the membership of the 2nd Respondent, 3 out of 5 members are also members of the 3rd Respondent and in the event of a split vote the 3 members who belong to both the 2nd and 3rd Respondents would not be impartial, the result being that the 3 would be prosecuting on cause and rendering judgement on cause. The Petitioners relied on the decision of the Court of Appeal in Onyango v Attorney General.

Mr. Oguttu submitted that the issues raised by the Petitioners called for conservatory orders as prayed.

Section 76(6) of the County Government Act prohibits the County Public Service Board to observe the principles of natural justice. Section 76(6) however allows a County Chief officer concerned on other lawful authority to interdict or suspend or take other interlocutory decision against a public officer. This therefore means that the chairman of the County Service Board had the mandate to take the interlocutory action of inviting the Petitioners to appear before the Public Service Board.

Regarding the argument of the Petitioners that the notice given to them contravened the Public Service Commission Guidelines which required them to be given 21 days notice, I have perused the Guidelines and Delegation Instruments of the Public Service Commission that the Petitioners submitted to Court. I find that there was no requirement of 21 days notice as the Guidelines expressly state that they are relevant only to Public Officers seconded to the County Governments. None of the Petitioners is a seconded Public Officer.

On the issue of impartiality, the membership of both the County Assembly and the County Assembly Service Board are prescribed by law. This means that inevitably in all cases dealing with discipline of County Assembly Service Board employees arising from the County Assembly's oversight mandate the membership of the Service Board would include its members who are also members of the County Assembly. To argue that such members should not sit in both the Assembly and the Board would be an

absurdity. It would mean that where such matters arise the affected employees should not be disciplined. This could not have been the intention of either the Constitution or the legislature when setting the membership of the two bodies.

In any event in any employment disciplinary case it is the employer who disciplines the employee for wrongs committed by the employee against that employer. The standard of impartiality required of judicial or quasi judicial tribunals can never be achieved in employment related disciplinary panels. Under Section 41 of the Employment Act which provides for the disciplinary process in employment cases, there is no requirement that the employer sources for independent panellist from outside its employment to hear disciplinary cases against its employees.

The issues as to whether or not there was fraud in the tendering process and discrimination in the handling of the fraud case are matters for proof at the hearing of the petition and not for determination in the interlocutory stage.

It is also material that when the Petitioners moved to court they did not disclose that they were already under suspension from their offices by letter dated 12th May, 2015 and were no longer in office owing to matters subsequent to the notices dated 8th May 2015 which is the subject of their Petition herein. The letters of suspension were written pursuant to resolutions of the 2nd Respondent made at the meeting held on 11th May, 2015. The letters of suspension gave them opportunity to respond to the allegations raised therein within 21 days.

For the foregoing reasons I find that the Petitioners have not demonstrated that any of their fundamental rights are under threat of violation or have been violated. They have not satisfied the principles set out in the Supreme Court's decision in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014]eKLR which determined that conservatory orders should be granted bearing in mind the public interests, the Constitutional values and the proportionate and priority levels attributable to the relevant causes. In the present case it is my opinion that public interest and the facts of the case militate against granting the prayers sought by the Petitioners.

For the foregoing reasons I dismiss the application with costs.

Dated, signed and delivered this 1st Day of February, 2016

MAUREEN ONYANGO

JUDGE

Petition No. 12 of 2015